6-4-2012

State v. Smith Appellant's Reply Brief Dckt. 39390

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39390
	)	
v.	)	
	)	
DENNIS RAY SMITH, JR.,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature of the Case

Mr. Smith asserted in his Appellant's Brief that the denial of credit for the time he served on probation and was adhering to the terms and conditions thereof was improper and failed to give effect to the unambiguous language of the statute. He contended that the unambiguous language did not preclude the denial of credit for the time he was on probation and adhering to the terms thereof, and to the extent that there was any ambiguity remaining about that issue, lenity required that ambiguity to be resolved in his favor. Mr. Smith supported these arguments with extensive and detailed analysis, particularly in regard to the proper interpretation of the statute, demonstrating precisely why his position was the only result of an understanding of the plain, unambiguous language in the statute. That interpretation left an ambiguity as to one particular scenario, which he pointed out should be resolved in his favor under the rule of lenity.

The State responded with several cursory and generic arguments which were unsupported beyond general statements of overarching rules of law. It responded to Mr. Smith's specific points, particularly his analysis of the grammar rules at issue with over-simplified assertions which ignored the grammatical underpinnings of the English language. And ultimately, most, if not all, of the authorities to which it cited actually strengthen Mr. Smith's arguments, revealing that both specifically and globally, the denial of credit for the time spent on probation and adhering to the terms thereof is inappropriate under the statute as it is written.

Additionally, Mr. Smith asserted that the district court failed to make an adequate record below by not adhering to the strictures of I.C.R. Rule 47 (*hereinafter*, Rule 47),

which requires orders to be entered as separate documents. The State admitted the district court's error, but simply asserted it was harmless without proffering any proof as to why such error might have been harmless. As the State bears the burden to prove the error harmless and it offered no proof to that end, it failed to meet its burden. Therefore, those errors cannot be deemed harmless.

As the State's arguments are markedly unpersuasive, Mr. Smith still maintains that this Court should reverse the district court's denial of credit and remand this case for a proper calculation of the time for which he should receive credit, or alternatively, remand this case so that a proper and sufficient record might be established.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Smith's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

1. Whether the district court erred in denying Mr. Smith credit for the time he served on probation.

2. Whether the district court improperly denied Mr. Smith's Rule 35 motion and failed to provide an adequate record in regard to its denials of his Rule 35 motion and motion for credit for time served.

ARGUMENT

I.

The District Court Erred In Denying Mr. Smith Credit For The Time He Served On Probation

A. Introduction

The State's cursory and generic arguments against Mr. Smith's assertions are markedly unpersuasive. In fact, most, if not all, of the authorities to which the State cites (when it cites authority at all) actually support Mr. Smith's assertions, further demonstrating that the statutes governing credit for time served unambiguously do no prevent the award of credit for time served on probation while the probationer adheres to the terms and conditions thereof. The result of the unambiguous language is that the statute does not address the scenario of when the probationer is adhering to the terms of his probation. As such, the statute is ambiguous in regard to that particular scenario. Therefore, the rule of lenity demands a resolution in Mr. Smith's favor in that regard. Because the State has failed to demonstrate any reason to affirm the district court's erroneous ruling, this Court should reverse the district court's denial of credit and remand this case for a proper calculation of the time for which he should receive credit.

B. The Prior Interpretations Of The Statute At Issue Are Inappropriate As They Fail To Give Force To The Unambiguous Language Of The Statute, Which Does Not Prevent A Probationer From Being Awarded Credit For Time Served On Probation Adhering To The Conditions Thereof

The primary statute governing credit for time served is Idaho Code § 18-309. It provides that:

> In computing the term of imprisonment, the person against whom the judgment was entered, [sic] shall receive credit in the judgment for any period of incarceration prior to entry of judgment, if such incarceration was

> for the offense or an included offense for which the judgment was entered. The remainder of the term commences upon the pronouncement of sentence and if thereafter, during such term, the defendant by any legal means is temporarily released from such imprisonment and subsequently returned thereto, the time during which he was at large must not be computed as part of such term.

I.C. § 18-309.[1] As described in detail in the Appellant's Brief (App. Br., p.8), the Idaho Constitution has separated powers between the branches of government, granting the Legislature the authority to enact laws, while only empowering the Judiciary to interpret those laws. *Mead v. Arnell*, 117 Idaho 660, 664 (1990). As a result, the Idaho Supreme Court has recently and clearly held that where a statute is unambiguous, the courts *must* give effect to the unambiguous language. *Verska v. Saint Alphonsus Regional Medical Center*, 151 Idaho 889, 895-96 (2011). This holds true even where the unambiguous language would lead to absurd or socially unsound results, as it is the province of the Legislature, not the Judiciary, to address those results. *Id.*; *State v. Schwartz*, 139 Idaho 360, 362 (2003). The courts are not empowered to avoid the policy implications of the unambiguous language merely because they disagree with those results. *Verska*, 151 Idaho at 895-96. Therefore, the State's arguments (and the prior decisions regarding the interpretation of this statute) which deprive the statute of its unambiguous meaning are improper and holding in favor of such arguments will

[1] Mr. Smith recognizes that the Court of Appeals has reviewed this statute in the past, but asserts that, as those prior rulings interpret the statute to bar the award of credit for time served on probation adhering to the terms thereof, their interpretation is erroneous and should be rejected. *See e.g. Taylor v. State*, 145 Idaho 866, 869-70 (Ct. App. 2008); *State v. Sutton*, 113 Idaho 832, 834 (Ct. App. 1987); *see also State v. Soto*, 2012 Unpublished Opinion No. 376, 2-3 (Ct. App. 2012), *rev. denied.* Instead, this Court should look to the plain, unambiguous language of the statue and give it the appropriate effect.

result in a violation of the separation of powers established in the Idaho Constitution. *See id.*

When determining the meaning of a statute, particularly an unambiguous statute, the courts are to look to the plain meaning of the words used. *See, e.g., Driver v. SI Corp.*, 139 Idaho 423, 429 (2003). In order to understand those words, the courts must necessarily apply the rules of grammar. *See State v. Rhode*, 133 Idaho 459, 462 (1999) (holding that courts look to the context in which the words are used in order to help understand their plain meaning). These grammar rules are not policy-driven and are designed to give effect to the ordinary understanding of the language itself. *See, e.g.,* James J. Burndly and Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 12 (2005). Ignoring, or worse, over-simplifying these rules, as the State has done in this case (Resp. Br., pp.6-7), creates a situation where language loses its meaning and communal understanding of a statute is impossible.

1. All The Definitions Of "At Large" Reveal That Mr. Smith's Argument – That It Only Applies To Periods When The Probationer Has Absconded – Is The Correct Interpretation

Mr. Smith provided a legal definition of the term of art "at large." (*See, e.g.,* App. Br., pp.8-9, 18.) The State provides three alternative definitions. (Resp. Br., p.6.) The first two of the State's definitions – "not under corporal control" and "not in confinement or captivity" – are essentially the same as that provided by Mr. Smith and are inapplicable to probationary release. The third definition, "not in prison," when examined in its entirety, including the illustrative example, is also inapplicable to probationary release.

The first two definitions are inapplicable to probationary release because the probationer adhering to the terms of his probation is corporally controlled and is confined. Mr. Smith, for example, was subject to at least eleven "special conditions"[2] as part of his probation which controlled where Mr. Smith could go and how he spent his time (maintain full time employment (Presentence Investigation Report (*hereinafter,* PSI), p.165), participate in treatment programs, including Cognitive Self Change, (PSI, p.165), and undergo a mental health evaluation and participate in any subsequently-recommended treatment (PSI, p.233)). He was also confined in his movements, as he would have to remain in Idaho unless his probation officer approved otherwise and regardless of that, he was required to accept extradition back to Idaho if the State demanded such. (*See* PSI, p.166.) In fact, he could not even change residences without the written consent of his probation officer. (*See* PSI, pp.224, 296.) These terms, as well as all the others lawfully imposed on Mr. Smith, reveal that he was under corporal control and was in confinement or captivity.[3]

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[2] The fact that these were "special conditions" indicates that there were additional common conditions which applied as a matter of course, all of which would further restrict or confine Mr. Smith while he was on probation. For example, the April 22, 2009, report of probation violation alleged that Mr. Smith had failed to obtain written permission to change residences from his probation officer. (PSI, pp.295-96; *see also* PSI, p.224 (same).) The "special conditions" did not require that Mr. Smith needed to maintain a residence or get permission from his probation officer to change said residence. (*See generally* PSI, p.166.) In fact, the report of probation violation listed that as a violation of "Supervision Condition (3)," and later listed independent violations of "Court Order Special Condition (e)."

[3] Noting specifically, the use of the alternative conjunction "or," which signals the definition applies to either term. Thus, this definition does not require captivity, merely a form of confinement, which exists through the enforcement of the terms of probation.

Only by trolling the internet was the State able to find a third definition which, if quoted just so, would support its argument.[4] And even then, the State failed to appreciate (or more to the point, provide) the example which that dictionary used to describe what it meant by "not in prison." (*See generally* Resp. Br., p.6.) That example is: "The *escaped* prisoners are still at large." Cambridge Dictionaries Online, http://dictionary.cambridge.org/dictionary/american-english/at-large?q=at+large (last visited May 25, 2012) (emphasis added). Thus, when the Cambridge Online Dictionary defined "at large" as "not in prison," it meant that the person has escaped from prison. *Id.* This definition actually supports Mr. Smith's argument that "at large" only applies to those persons who have absconded (or escaped) and are thus, not confined, controlled, or otherwise in custody.[5] *See, e.g., Gonzales*, 139 Idaho at 385 ("Gonzales *never again reported to her probation officer, and she remained at large* for more than nine years") (emphasis added). And as Mr. Smith's release was not secured by escape (but was rather by the legal means of probation), all four definitions provided in the briefs support Mr. Smith's position that a probationer is not "at large."

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[4] However, the State provided an insufficient citation for to this definition (*see* Resp. Br., p.6), omitting, of all things, a URL reference to the web page to which it was referring. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, 18.2, at 153-58 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005). Luckily, through Google, the actual website is identifiable. *See* Cambridge Dictionaries Online, http://dictionary.cambridge.org/ dictionary/american-english/at-large?q=at+large (last visited May 25, 2012).

[5] Mr. Smith recognizes that the escapee may be subject to legal restraint when apprehended, but during the time he is escaped, he is not in the custody of any legal authority, nor is he confined to any particular location by force of law, regardless of the State's belief to the contrary. (Resp. Br., p.10.) The escapee is at large, free to go where he will in his efforts to elude capture.

Contrary to the State's only other argument in this regard, the statutory scheme as a whole supports Mr. Smith's argument. (*See* Resp. Br., pp.7-8.) The statutory scheme surrounding similar releases from incarceration (furlough and parole, for example) both permit credit against the sentence for the period during which the person is released. In fact, Judge Schwartzman has already commented on the incongruity within the statutory scheme where parolees are able to receive credit where probationers (whose situation is nearly identical) cannot.[6] *See State v. Jakoski*, 132 Idaho 67, 69 (Ct. App. 1998) (Schwartzman, Judge, specially concurring). As such, Mr. Smtih's interpretations of the term "at large" and of the statute as a whole are congruent with the overall statutory scheme.

Furthermore, the two statutes to which the State points are also congruent with Mr. Smith's position. (*See* Resp. Br., pp.7-8 (quoting I.C. § 19-2603 and I.C. § 20-209A).) I.C. § 19-2603 includes the "at large" language, which as Mr. Smith has already demonstrated, does not extend to persons on probation adhering to the conditions thereof. As such, just as with I.C. § 18-309, probation is not included within I.C. § 19-2603's scenario where credit may be denied.

I.C. § 20-209A provides: "The time during which the person is voluntarily absent from the penitentiary, jail, facility under the control of the board of correction, ***or*** *from the custody of an officer after his sentence*, shall not be estimated or counted as a part of the term for which he was sentenced." I.C. § 20-209A (emphasis added). Here again,

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[6] Even if this Court accepts the State's proposed interpretation of the term "at large," this criticism reveals that the disparate treatment of parolees – allowing them to get credit for the time spent at large on parole (*see Richardson v. State*, 90 Idaho 566, 568 (1966)) – is inappropriate. *See Jakoski*, 132 Idaho at 69 (Schwartzman, Judge, specially concurring).

the Legislature uses unambiguous language which does not extend to probation. It sets up two scenarios where a person is voluntarily absent. One is from a penitentiary, jail or other Department of Correction facility. The alternative scenario, set apart by the conjunction "or," refers to "[t]he time during which the person is voluntarily absent . . . from the custody of an officer after his sentence." *See* I.C. § 20-209A. Since the probationer is subject to the custody of an officer (*see* App. Br., p.8 n.2), and that custody begins after the sentence has been imposed, this alternative can only apply to a person who was on probation (or other person similarly released) but who has absconded. As such, the only interpretation of this statute which can give meaning to both clauses, *see, e.g., Athay*, 142 Idaho at 365, is that the first clause applies to only persons who are incarcerated and who are voluntarily absent from that incarceration (*i.e.*, escaped) from the place of their incarceration, and the second clause applies only to persons who were released to the custody of an officer and who are voluntarily absent from that probation (*i.e.*, absconded). As such, this statute does not prevent an award of credit to the probationer for the time he is adhering to the conditions of his probation (*i.e.*, not voluntarily absent from the custody of an officer after his sentence). I.C. § 20-209A. These arguments also demonstrate why the previous decisions permitting the denial of such credit were inappropriately decided.[7]

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[7] *See, e.g., Taylor*, 145 Idaho at 869-70; *Sutton*, 113 Idaho at 834.

2. Contrary To The State's Unsupported Arguments, The Rules Of Grammar Reveal That the Plain Language Of The Statute Does Not Include Probation In The Period For Which The Defendant Is Not Entitled To Credit

Mr. Smith presented reasoned arguments as to the proper interpretation of the statute and supported his interpretation with various authorities. Not only do the State's responses over-simplify the grammar rules in application to this statute, they fail to provide support for its assertions. (*See* Resp. Br., pp.6-7.) Other than its quotes of statutes,[8] the only authorities the State cites as it responds to Mr. Smith's assertion that a probationer adhering to the terms of his probation was not at large are *Cornell v. Mason*, 46 Idaho 112 (1928), a decision defining "escape" (as opposed to "release on probation")[9] and *Athay v. Stacey*, 142 Idaho 360, 365 (2005), which stands

[8] The State cites I.C. § 18-309 (the statute at issue) and I.C. § 19-2523(e) (another use of the term "at large").

[9] As the probation statutes were enacted well after the *Cornell* decision (according to the credits of the statute, I.C. § 19-2601, which allows for imposition of probation, was enacted in 1972, as was I.C. § 18-309), it would be counterintuitive to base the language used in those statutes only on that decision, and not the evolved understandings and uses of the terms in subsequent years. In fact, the Idaho Supreme Court has recently held as much, requiring appellate courts to look to the specific meanings imbued to terms, such as terms of art, and to presume the Legislature was aware of those specific meanings when it opted to use those terms. *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 212 (2003) (discussing a situation where jurisprudence expanded the definition of the term in question beyond a common-usage definition for purposes of a specific statute). However, the definition of the term "at large" has evolved since 1928 and has subsequently and consistently been used to refer to only those times when the person is not in custody and whose whereabouts are unknown. *See, e.g., Jacobson v. McMillian*, 132 P.2d 773, 778 (Idaho 1943) ("permitting O'Connor *to escape and be at large*") (emphasis added); *State v. McKaughen*, 108 Idaho 471, 472 (Ct. App. 1985) ("committed by the *escapee while he was at large*") (emphasis added); *Application of Chapa*, 115 Idaho 439, 443 (Ct. App. 1989) ("a prisoner who *escapes* from incarceration should [not] be permitted accrual of the time toward his sentence *while he is at large*") (emphasis added); *Gonzales v. State*, 139 Idaho 384, 385 (Ct. App. 2003) ("Gonzales *never again reported to her probation officer, and she remained at large* for more than nine years") (emphasis added); *Fullmer v. Collard*, 143 Idaho 171, 172 n.2 (Ct. App. 2006) ("tak[ing] into account the three days that [the defendant] was *at large following his escape*")

for the well-established principle that statutes are to be interpreted so as to "give effect to every word, *clause* and sentence of the statute." (Resp. Br., pp.6-7 (emphasis added).) The State did not provide any authority supporting its purported application of "grammatical rules," such as its claim that all terms within a sentence are "directly related" to one another, and thus, modify one another. (*See generally* Resp. Br., pp.6-7.) And apart from being an unsupported and inaccurate assertion of a "grammar rule," this assertion, encourages this Court to disregard the foundation of the language, ignore the actual grammatical rules, and twist the statute so that it has the definition the State wishes it had. Such a transmogrification of the statute is inappropriate, especially where the language is unambiguous. *See, e.g., Verska*, 151 Idaho at 895-96.

Such a disregard of grammatical rules does not, and cannot, give effect to the plain language of the statute. In addition, despite its recognition of the rule articulated in *Athay*, the State's attempted interpretation fails to give meaning to the two separate and distinct clauses within the sentence. (*Compare* App. Br., pp.14-15.) The two terms which the State purports may modify one another ("by any legal means" and "at large") are in two different clauses. (*See* App. Br., pp.14-15.) Adopting the State's rationale deprives the two clauses of their individual effect within the sentence, and therefore, violates the rule articulated in *Athay*. (*See* App. Br., pp.12-15, 18-21.) It also fails to give meaning to the various phrases within those clauses, further depriving the sentence of coherent and rational meaning. As such, absent any discussion or

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(emphasis added); *compare Cornell v. Mason*, 46 Idaho at 120. As such, this Court should look, and give effect, to the modern use (as opposed to the archaic use) of the term, as it would have been understood by the Legislature when it chose to use that particular term of art. *See, e.g., Robison*, 139 Idaho at 212.

understanding of the basic rules of grammar, the State's interpretation cannot be the "plain meaning" of the statute. Rather, it is only the meaning the State wishes the statute had, but as the Idaho Supreme Court recently reaffirmed, the courts [and the State] are not empowered to avoid the policy implications of the unambiguous language merely because they disagree with those results. *Verska*, 151 Idaho at 895-96.

Rather, the plain language, understood through a proper reading of the terms based on the necessary underpinning grammatical rules, indicates that the term "by any legal means" modifies only the term "release," and not the term "at large." (*See* App. Br., pp.13-15.) To hold otherwise, and to ignore the rules of grammar, deprives the unambiguous language of the statute of its plain meaning.

Operating from the plain meaning of the statute, it becomes clear that release on probation fits neither the definition of "release" in this statute (because of the Legislature's requirement that the release be temporary (*see* App. Br., pp.15-17)) nor "at large" (because of the plain definition of this term of art in the law (*see* App. Br., pp.18-24)).[10] As such, the plain meaning of the statute does not prevent an award of credit for time served on probation while adhering to the terms thereof. The result is that the statute is ambiguous in regard to whether an award for such time is appropriate (since the statute does not specifically include or exclude periods of time when the defendant is on probation and adhering to the terms thereof, but does explicitly include periods of incarceration and explicitly exclude periods during which the defendant is "at large," which, in this context, is commonly understood to be absconding from

[10] The arguments over the definition of "at large" are sufficiently set forth in Section B(1), *supra*, and need not be reiterated here. They are incorporated herein by reference thereto.

probation.). That ambiguity must be resolved in Mr. Smith's favor, pursuant to the rule of lenity. *See, e.g., State v. Anderson*, 145 Idaho 99, 103 (2007).

As it did with the grammar rules argument, the State's attempts to brush away Mr. Smith's responses to these issues are generalized and cursory. However, a more critical and in depth examination of these arguments reveals that neither of the State's assertions actually undermines Mr. Smith's arguments, nor do they correctly read and apply the law to this case.

With regard to the term "temporarily," the State argues that the simple fact that the person who violates his probation is necessarily brought back to court somehow makes probation a temporary status. (Resp. Br., p.5.) It does not, however, provide any analysis as to why that interpretation is somehow more appropriate than that forwarded by Mr. Smith, which is supported by precedent. (*See* App. Br., pp.15-17.) Regardless, the State's interpretation is wrong because probation, by design, is meant to be a permanent release (not "for a time only"). (*See* App. Br., pp.15-17 (quoting MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS, 821 (2007)).) The probationer who adheres to the terms of his probation for the allotted period of time is not required to return to the prison before being discharged. Rather, the result for a case like Mr. Smith's (*i.e.*, involving a period of retained jurisdiction) is that the sentence is reduced in length to a period of time equivalent to the period of incarceration which the defendant has already served, and for which the defendant gets credit. I.C. § 19-2604(1). This leaves the probationer with no more time to serve and he is free to go without restraint. *See id.* As such, the release is not for a time only.

The impact of that observation is apparent when a probationary release is compared with a furlough. The furloughed inmate is required to return to the place of his incarceration at the end of the furlough period. *See, e.g., State v. Chavez*, 134 Idaho 308, 310 (Ct. App. 2000). In *Chavez*, the Court of Appeals articulated that, "while on work release, Chavez *failed to return to the jail at the end of his workday*. He *remained at large* for approximately five months. Chavez was consequently *charged* in a separate case *with escape* . . . ." *Id.* (emphasis added).[11] Thus, the requirement that the person return, which is clear at the outset of the release, reveals whether that release is intended to be temporary (*i.e.*, the person is required to come back at a *designated time*) or permanent (*i.e.*, the person is not *required* to come back at any particular time, if at all). Because release on probation does not *require* the probationer to return to prison at any particular time, if ever, it is a permanent release. Any temporariness caused by the return to incarceration (*see* Resp. Br., p.7 n.2) does not make the period a "temporary release," since there is no way at the outset of the release period to determine when, if ever, that alternative will be enacted. As it is not a temporary release, it cannot be included in the narrow scenario where credit may be denied. *See* I.C. § 18-309.

[11] This language demonstrates not only the difference between temporary and permanent release, but also the proper use of the term "at large" in relation to such a scenario. *See Chavez*, 134 Idaho at 310.

3. To The Extent That There Are Multiple Rational Interpretations Of This Statute, The Rule Of Lenity Requires That The Resulting Ambiguity Be Resolved In Mr. Smith's Favor

As discussed above, none of the State's arguments undermine Mr. Smith's assertions. In fact, most of the State's cited sources actually support Mr. Smith's arguments. However, to the extent that any of the State's positions are rational, that only creates a scenario where there are multiple, rational interpretations of a statute. In such a scenario, the rule of lenity requires that the resulting ambiguity be resolved in Mr. Smith's favor. *See, e.g., Anderson*, 145 Idaho at 103. In this case, that would mean that Mr. Smith should be credited for the time he spent on probation adhering to the restrictions thereof. Therefore, the denial of credit for the time Mr. Smith spent on probation, in the custody of the Department of Correction, subject to the numerous restrictions on his freedom, was improper and needs to be reversed under a proper interpretation of the statute.

II.

The District Court Improperly Denied Mr. Smith's Rule 35 Motion And Failed To Provide An Adequate Record In Regard To Its Denials Of His Rule 35 Motion And Motion For Credit For Time Served

The State concedes that the district court denied Mr. Smith's Rule 35 motion on improper grounds and did not comply with I.C.R. Rule 47 when it issued its orders in that regard (writing them on the faces of the motions themselves).[12] (Resp. Br., p.3

[12] By arguing that the error was harmless (Resp. Br., p.3 n.1), the State also necessarily conceded that the district court's notation has the full effect of a properly-entered order, and thus, this Court can consider and rule on the substantive issue (whether the denial of the Rule 35 motion was proper, based on the rationale that it was filed untimely). And while this Court does not have to accept the concession, if it chooses not to, Mr. Smith's argument remains the same – that the district court improperly denied his

n.1.) Because the motion was resolved on improper grounds, the district court did not consider the various evidence Mr. Smith presented in support of his motion or rule on merits of his argument. (*See generally* R., pp.229-247.) Because of that failure, this case should be remanded for a proper resolution of the Rule 35 motion in regard to the proper amount of credit to which Mr. Smith is entitled. As set forth in Section I, *supra*, that calculation should include credit for the time Mr. Smith served on probation and adhered to the terms thereof.

CONCLUSION

Mr. Smith respectfully requests this Court reverse the district court's denial of credit and remand this case for a proper calculation of the time for which he should receive credit. Alternatively, he respectfully requests that this case be remanded so that a proper and sufficient record as to his Rule 35 motion might be established.

DATED this 4th day of June, 2012.

BRIAN R. DICKSON
Deputy State Appellate Public Defender

Rule 35 motion as untimely since his assertion was that the district court improperly calculated the credit to which he was entitled. A Rule 35 motion for that reason does not have a time-for-filing restriction. I.C.R. 35(c). Therefore, the district court's denial premised on timeliness is inappropriate and the case should be remanded for a proper resolution of the issues present in Mr. Smith's Rule 35 motion.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4th day of June, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

DENNIS RAY SMITH JR
INMATE #72304
ICC
PO BOX 70010
BOISE ID 83707

DEBORAH A BAIL
DISTRICT COURT JUDGE
E-MAILED BRIEF

ALAN E TRIMMING
ADA COUNTY PUBLIC DEFENDER'S OFFICE
E-MAILED BRIEF

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BRD/eas